

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 11, 1997

TO: F. Rozier Sharp, Regional Director, Region 17

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Epsen Lithographing Co., Case 17-CA-18946

133-5200, 625-4467-1500

This case was submitted for advice as to whether the employer violated Section 8(a)(5)-8(d) by failing to pay full contractual benefits to laidoff employees for the 60 day period required under the WARN⁽¹⁾ Act.

FACTS

the Employer implemented its final offer. In both units, employees accrued vacation leave only if they were working at the end of the calendar year; such accrued vacation leave could be used during the following year.

On November 3, 1996, the Employer announced that it was closing immediately and that, pursuant to the WARN Act, it would pay employees 60 days' pay in lieu of the 60 days' notice required by the WARN Act. The Employer also stated that it would withhold employees' copayments for health insurance during this period so that health insurance would remain effective for the next 60 days.

During subsequent effects bargaining, the Employer stated that it would pay for earned but unused vacation, that is, vacation earned during 1995 but not used during 1996. However, the Employer refused to pay for 1996 vacation benefits, contending that, since the Employer ceased operations on November 3, no employees would be working, and hence no employees would be entitled to accrued vacation, at the end of 1996. The Union contends that the employees would have been working at the end of 1996 but for the Employer's decision to cease operations and pay wages instead of continuing operations until January 3, 1997, 60 days after it announced its closure. The Union thus contends that, in addition to 60 days' wages, the employees are entitled to the vacation benefits.

ACTION

The charge should be dismissed, absent withdrawal.

The Employer's obligation to pay 60 days' wages, instead of giving 60 days' notice before closure, comes from the WARN Act, not from the NLRA.⁽²⁾ Nor does the Employer's obligation come from the contract with the Union covering the bindery unit; the contract is merely a means for measuring the employees' damages under the WARN Act. Thus, even assuming that there is merit to the Union's claim that the WARN Act requires the Employer to pay vacation benefits as well as wages in lieu of the 60 days' notice,⁽³⁾ the Employer's failure to do so does not violate the NLRA under either Section 8(a)(5) or Section 8(d).⁽⁴⁾

The Union's charge seeks to use the Board to collect benefits due under another statute. This factor distinguishes this case from those cases raising issues under *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*,⁽⁵⁾ where the Supreme Court held that the Board has exclusive jurisdiction over a claim that an employer has unlawfully failed to make contributions into a pension trust fund after the expiration of a collective-bargaining agreement, although such claims arising during the life of a contract can be pursued by a means of a lawsuit under Section 502(g)(2) and 515 of ERISA. Pension contributions are a mandatory subject of bargaining under the Act. Here, however, the Union is asserting neither statutory nor contractual rights under the Act, and therefore the Union should seek redress from the courts, not from the Board.

B.J.K.

¹ Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. Sec. 2101 et seq.

² See Times Herald Printing Co. d/b/a Dallas Times Herald, 315 NLRB 700 (1994), where the Board held that WARN Act payments were in addition to, and not in lieu of, remedies provided by the Act.

³ See Carpenters v. Dillard Department Stores, 15 F.3d 1275, 1283 (5th Cir. 1994)(under WARN Act, employees entitled to wages and benefits they would have earned, but for employer's violation, relying on Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)); Washington v. Aircap Industries, 860 F.Supp. 307, 9 IER Cases 1395 (D. S.CA. 1994) (employees entitled to costs of insurance premiums as well as wages under WARN Act).

⁴ The Union does not allege that the Employer failed to comply with the contract before it ceased operations.

⁵ 484 U.S. 539 (1988).